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7 ROBERT MILLER

8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**
10 **LAS VEGAS DIVISION**

11 ROBERT MILLER,

12 Plaintiff,

13 v.

14 4INTERNET, LLC; and DOES 1 through
15 10 inclusive,

16 Defendants..

Case No. 2:18-cv-02097-JAD-VCF

**NOTICE OF MOTION AND
MOTION FOR SUMMARY
JUDGMENT**

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:
2 PLEASE TAKE NOTICE that Plaintiff Robert Miller will move for Summary
3 Judgment against Defendant 4Internet, LLC pursuant to Federal Rules of Civil
4 Procedure 56(a).

5 This Motion is based on this Notice of Motion, the attached memorandum of
6 points and authorities, the declaration of Ryan E. Carreon, Robert Miller, and
7 Eugene Sadowski in support, the Separate Statement of Undisputed Facts, Index of
8 Exhibits and Evidence, and the pleadings, files and other materials that are on file
9 with the Court or may be presented at the hearing.

10 Dated: November 1, 2021

Respectfully submitted,

11 /s/ **Ryan E. Carreon**
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

A. Robert Miller Is A Professional Photographer

Plaintiff Robert Miller (“Miller”) has been a professional photographer since 1991. Separate Statement of Undisputed Facts (“SSUF”) No. 1. In 1991 Miller graduated with a B.F.A. from The Cooper Union which he attended on full scholarship. SSUF No. 2

Miller’s photographs have been published in numerous magazines and newspapers such as *Time*, *Newsweek*, *LIFE*, *US News and World Report*, *Business Week*, *Stern*, *Der Spiegel*, *Paris Match*, *Rolling Stone*, *Vanity Fair*, *Elle*, *People*, *New York Magazine*, *The London Times*, *The South China Morning Post*, *USA Today*, *The New York Times*, *NY Daily News*, *Newsday*, and *VOICE*. SSUF No. 3. Miller’s work on 9/11 is in the permanent collection in The Library of Congress, published in several books was also included in a Bill Moyers *Frontline* documentary about 9/11 that appeared on PBS. SSUF No. 4.

In approximately 2000 or 2001, Miller began working as a freelancer for the New York Post (“Post”), and he continues to freelance for the Post today. SSUF No. 5. Under this arrangement, Miller charges the Post a negotiated flat rate per shift for a non-exclusive editorial license to the photographs that he takes during that shift, and in exchange he gets to keep the copyrights to the photographs, which he can then license to third parties. SSUF No. 6. Often, Miller is able to take photographs of interesting or notable events, and since he retains the copyrights to his photographs, his is able to command significant licensing value on the secondary market. SSUF No. 7.

Millers typically never allows his photos to be used without payment of a license fee. SSUF No. 8. Since photography is Miller’s sole job, he depends on the payment of license fees in order to make a living. SSUF No. 9. The unauthorized use of Miller’s photographs has led to a rapid decline in the number of paid licenses and

1 impacts the overall value of his photographs by diminishing exclusivity and causing
2 Miller to have to devote significant amounts of time and money to detecting and
3 pursuing infringements. SSUF No. 10.

4 **B. 4Internet Owns And Operates The 4Search Network**

5 Founded in 2010, Defendant 4Internet, LLC (“4Internet”) is a company that
6 registers and sells domains and hosts web servers. SSUF No. 11. Two of the
7 domains that 4Internet owns are www.4jewish.com (“4Jewish”) and
8 www.4rightwing.com (“4RightWing”). SSUF No. 12.

9 4Internet owns and operates over 1,000 domains in the “4Search network” all
10 of which begin number “4” followed by a topic or “affinity type.” SSUF No. 13. The
11 purpose of 4Internet utilizing these affinity types is to allow users to self-select so
12 that they can receive targeted search results based on topics of interest. SSUF No.
13 14.

14 This targeted search functionality begins with “seed points” which are
15 domains preselected by 4Internet based on their relevance to a specific affinity type
16 and that act as a starting point for a particular search conducted on one of the
17 websites in the 4Search network. For example, one seed point for 4RightWing was a
18 Wikipedia page that identified certain news outlets as right-wing and which was
19 coded by 4Internet into its search algorithm. SSUF No. 15. Web crawlers start at
20 these seed points and compile information deemed relevant into an “index” which is
21 an organized compilation of information designed to be accessed quickly to produce
22 a set of search results in response to a search query. SSUF No. 16.

23 Once a webpage is indexed, it remains in the 4Internet index until a user
24 performs a search query. SSUF No. 17. After a query is entered into one of the
25 domains in the 4Search network, a web page is generated based on specifications
26 provided by 4Internet which tells the index which information to use to populate the
27 page and how to compile that information to display through a user’s browser. For
28 example, 4Internet can set a limit to the amount of text that populates from the index

1 or can cause indexed photographs to be displayed or completely blocked on the page
2 that iss generated. SSUF No. 18.

3 **C. Miller Captured A Photograph Of Fred The Goat**

4 Miller is the sole creator of a photograph of “Fred the Goat” (“Goat
5 Photograph”). SSUF No. 19.

6 On August 9, 2018, Miller was given an assignment by the Post to investigate
7 the mass break out of dozens of goats and sheep from a slaughterhouse in
8 Hackettstown, New Jersey. Approximately one year earlier a goat that the locals
9 nicknamed “Fred” had escaped from the same slaughterhouse and had been living in
10 the area ever since. After the mass breakout, police received a tip that Fred was also
11 spotted in the area. Police and residents were able to herd about 60 of the animals
12 back to their pens, but many remained on the loose. Sometime after the animals were
13 rounded up, Fred was spotted headbutting the gate to their pen, apparently in an
14 effort to help them escape again. This second sighting of Fred led to speculation that
15 Fred had facilitated the initial breakout. SSUF No. 20.

16 Miller packed two of his Cannon cameras and approximately two or three
17 different camera lenses and drove to Hackettstown. SSUF No. 21. When Miller
18 arrived in Hackettstown, he drove through the middle of town but did not see any
19 goats and I wound up near the train tracks. Miller got out of his car and noticed a
20 police officer speaking to a different media outlet. Miller listened as he described the
21 area of town in Fred had been sighted. Subsequently, as Miller was returning to his
22 car, to his great surprise, Miller saw Fred the goat standing a few hundred feet in
23 front of him. SSUF No. 22.

24 Miller quickly chose the camera and lens that he thought would produce the
25 most compelling photograph based on the circumstances and his, experience and
26 adjusted the settings such as the ISO and shutter speed. Specifically, Miller knew
27 that Fred the goat would be moving, and he chose the specific camera settings and
28 lens to create a sharp focus and minimize blur -- ideally trying to keep the front of

1 the goat's foot to the rear part of the goat's foot in focus, while dropping the
 2 background out of focus so that the goat pops out to the viewer. Miller also used a
 3 low ISO setting, because low ISO creates less grain, whereas more grain means
 4 more contrast on the image has making it less clear. While photographing Fred,
 5 Miller determined the framing and angle of each of the shots. For example, Miller
 6 wanted to take a picture of Fred from the side as opposed to straight on, Miller also
 7 wanted to make sure that Fred's whole body was in frame and that Miller was
 8 shooting from a perspective to take advantage of the best lighting possible, and
 9 Miller also tried to minimize the visual interference of any background elements.
 10 Miller also used his professional skill and experience to determine the precise
 11 moment in time to take the photographs, for example, Miller waited to make sure
 12 Fred's head was raised up, and to make sure that his posture and positioning would
 13 create the most visually appealing shot. SSUF No. 23.

14 After the assignment was completed, Miller submitted approximately 30
 15 photographs to the Post, including the Goat Photograph. SSUF No. 24. Later that
 16 evening, the Post ran a story with the Goat Photograph titled "Rouge goat may have
 17 helped dozens of farm animals escape" ("Post Article"). SSUF No. 25.

18 Miller subsequently registered the Goat Photograph with the United States
 19 Copyright Office on September 25, 2018 and was issued registration certificate VA
 20 2-120-723. SSUF No. 26. The Goat Photograph is listed on registration certificate
 21 VA 2-120-723 as 8.9.18._FRed_the goat_.Miller.jpg. SSUF No. 27.

22 **D. 4Internet's Infringing Conduct Is Discovered**

23 On or about August 31, 2018 Eugene Sadowski ("Sadowski") conducted a
 24 Google reverse image search and discovered the Goat Photograph at issue in this
 25 case being displayed on two websites, www.4jewish.com and www.4rightwing.com.
 26 SSUF No. 28. The pages on 4Jewish and 4RightWing featuring the Goat Photograph
 27 were generated using information that had been indexed by 4Internet from the RSS
 28 feed originating from the Post's website at www.nypost.com/feed which is indexed

1 by 4Internet in regular intervals. SSUF No. 29. The Goat Photograph was not pulled
2 from Twitter or any other source other than the Post's RSS feed. SSUF No. 30.

3 According to Post's "Terms of Service" from August 2018, "all content,
4 features, and functionality ... ('Services')" of the Post's website "are to be used
5 solely for your non-exclusive, non-assignable, non-transferable and limited personal
6 use and for no other purposes" and "you shall not, nor shall you allow any third
7 party (whether or not for your benefit or otherwise) to, frame, reproduce, modify,
8 create derivative works from, display, perform, publish, distribute, disseminate,
9 broadcast or circulate to any third party (including, without limitation, on or via a
10 third-party website or platform), or otherwise use, any Content without the express,
11 prior written consent of Company or its owner if Company is not the owner." SSUF
12 No. 31.

13 The Goat Photograph was displayed on 4Jewish and 4RightWing via an inline
14 link directly from the Post's website without any alteration by 4Internet. SSUF No.
15 32. The Goat Photograph displayed on 4Jewish and 4RightWing was not a
16 thumbnail, but rather was a full-sized image because thumbnail images were too
17 small and too low quality for 4Internet's purposes. SSUF No. 33.

18 The Goat Photograph was displayed on 4Jewish and 4RightWing above text
19 from the Post Article. SSUF No. 34. 4Internet never contacted the Post to obtain
20 permission to use any of the content from the Post's RSS Feed on 4Jewish or
21 4RightWing, including the text and the Goat Photograph. SSUF No. 35.

22 After discovering the Goat Photograph on 4Jewish and 4RightWing,
23 Sadowski alerted Miller of the discovery by email and attempted to take screenshots
24 of the webpages. SSUF No. 36. Due to a malfunction in the screenshotting program
25 used by Sadowski, the August 31, 2018 full page screenshot of the page on 4Jewish
26 generated a fragmented image, however counsel for Miller subsequently prepared a
27 corrected version which, to Sadowski's recollection, appears to accurately reflect
28 how the page displaying the Goat Photograph on 4Jewish appeared on August 31,

1 2018. SSUF No. 37. At the time the August 31, 2018 screenshots were taken,
 2 4Internet was actively developing the appearance and functionality of its webpages
 3 in order to try figure out what users would respond to which resulted in numerous
 4 changes that occurred day to day, hour by hour, or sometime even click by click.
 5 SSUF No. 38.

6 On September 21, 2018, Sadowski again visited the 4Jewish page displaying
 7 the Goat Photograph. SSUF No. 39. Sadowski noticed that both the page displaying
 8 the Goat Photograph as well as the design of the 4Jewish website had changed and
 9 took another screenshot. SSUF No. 40.

10 Miller did not ever license my Goat Photograph to 4Internet, LLC, or
 11 otherwise give it permission to display the Goat Photograph on any of its websites.
 12 SSUF No. 41.

13 **II. LEGAL STANDARD**

14 **A. Summary Judgment Standard**

15 Summary judgment is appropriate if the pleadings and the evidence
 16 demonstrate “there is no genuine issue as to any material fact and that the moving
 17 party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56. The party
 18 seeking summary judgment bears the initial burden of demonstrating that no
 19 genuine dispute of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
 20 (1986). Summary judgment is appropriate if the non-moving party fails to offer
 21 “evidence on which the jury could reasonably find for the [non-moving party].”
 22 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The moving party need
 23 only point to the absence of evidence proffered by the non-moving party. *Celotex*,
 24 477 U.S. at 325.

25 **III. 4INTERNET’S INFRINGING CONDUCT IS NOT DISPUTED**

26 **A. Miller Has Established *Prima Facie* Copyright Infringement**

27 To establish a prima facie case of copyright infringement, a plaintiff “must
 28 demonstrate ‘(1) ownership of a valid copyright, and (2) copying of constituent

elements of the work that are original.” *Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006) (quoting *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)). “The word ‘copying’ is shorthand for the infringing of any of the copyright owner’s five exclusive rights” under 17 U.S.C. § 106. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001) (quotation omitted)). These exclusive rights include the right to reproduce, distribute, publicly display, perform, or create derivative works of the copyrighted work. *See* 17 U.S.C. § 106.

A plaintiff need not demonstrate the defendant's intent to infringe the copyright in order to demonstrate copyright infringement. *UMG Recordings, Inc. v. Disco Azteca Distributors, Inc.*, 446 F. Supp. 2d 1164, 1172 (E.D. Cal. 2006); *see also Educational Testing Service v. Simon*, 95 F.Supp.2d 1081, 1087 (C.D.Cal.1999) (copyright infringement “is a strict liability tort”).

1. Miller’s Goat Photograph Is Sufficiently Original To Qualify For Copyright Protection.

A certificate of registration validly obtained from the Copyright Office within five years of first publication of a work constitutes *prima facie* evidence of the originality of the work and of the facts stated therein, including ownership. *See* 17 U.S.C. § 410(c).

It is undisputed that Miller created the Goat Photograph on August 9, 2018 and registered it with an effective registration date of September 25, 2018. *See* SSUF Nos. 19-27. Thus, Miller’s Goat Photograph is entitled to this statutory presumption because it was registered with the Copyright Office within five years of publication. *See* 17 U.S.C. § 410(c).

Even if not afforded the statutory presumption of originality, the Goat Photograph easily makes the grade. Photographs have long been the subject of copyright. *See* 17 U.S.C. § 102(a)(5) (extending copyright protection to “pictorial, graphic, and sculptural works”). In the seminal case protecting photos, the Supreme

1 Court held that a photographic portrait of Oscar Wilde was entitled to copyright
2 protection because of various creative elements employed by the photographer.
3 *Burrow–Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884); *see also Ets-Hokin v.*
4 *Sky Spirits, Inc.*, 225 F.3d 1068, 1074 (9th Cir. 2000) (affirming copyrightability of
5 photograph of vodka bottle and noting the “prevailing view” that “almost any[]
6 photograph may claim the necessary originality to support a copyright merely by
7 virtue of the photographers’ [sic] personal choice of subject matter, angle of
8 photograph, lighting, and determination of the precise time when the photograph is
9 to be taken.”); *see also Jewelers’ Circular Pub. Co. v. Keystone Pub. Co.*, 274 F.
10 932, 934 (S.D.N.Y. 1921) (“no photograph, however simple, can be unaffected by
11 the personal influence of the author.”) (Hand, J.).

12 Here, it is not disputed that the Miller made numerous creative decisions when
13 creating the Goat Photograph. For example, Miller took multiple cameras and lenses
14 with him on the assignment, and upon spotting Fred the Goat, made a creative
15 decision to choose the camera and lens that he thought would produce the most
16 compelling photograph based on the circumstances and his, experience. SSUF No.
17 23. In addition, Miller adjusted the camera settings, to create a sharp focus and
18 minimize blur -- ideally trying to keep the front of the goat’s foot to the rear part of
19 the goat’s foot in focus, while dropping the background out of focus so that the goat
20 pops out to the viewer. *Ibid.*

21 Miller also used a low ISO setting, because low ISO creates less grain,
22 whereas more grain means more contrast on the image making it less clear. *Ibid.*
23 Miller also determined the framing and angle of each of the shots, including making
24 the creative decision to capture Fred from the side as opposed to straight on. *Ibid.*
25 Miller also wanted to make sure that Fred’s whole body was in frame and that Miller
26 was shooting from a perspective to take advantage of the best lighting possible, and
27 Miller also tried to minimize the visual interference of any background elements.
28 *Ibid.* Miller also used his professional skill and experience to determine the precise

1 moment in time to take the photographs, for example, Miller waited to make sure
 2 Fred's head was raised up, and to make sure that his posture and positioning would
 3 create the most visually appealing shot. *Ibid.*

4 These creative decisions are sufficient to meet the relatively low bar for
 5 originality. *See Feist Publ'ns, Inc.* 499 U.S. at 345 (“To be sure, the requisite level of
 6 creativity is extremely low; even a slight amount will suffice.”)

7 Therefore, Plaintiffs should be granted summary judgment as to the first
 8 element of copyright infringement.

9 **2. *4Internet Is Directly Liable For Copyright Infringement.***

10 To establish a prima facie case of direct infringement, a plaintiff “must show
 11 ownership of the allegedly infringed material” and “demonstrate that the alleged
 12 infringers violated at least one exclusive right granted to copyright holders under 17
 13 U.S.C. § 106.” *A&M Records*, 239 F.3d at 1013. In addition, direct infringement
 14 requires the plaintiff to show causation (also referred to as “volitional conduct”) by
 15 the defendant. *See Fox Broad. Co., Inc. v. Dish Network L.L.C.*, 747 F.3d 1060,
 16 1067 (9th Cir. 2013).

17 The word “volition” in this context does not really mean an “act of willing or
 18 choosing” or an “act of deciding,” rather, it “simply stands for the unremarkable
 19 proposition that proximate causation historically underlines copyright infringement
 20 liability no less than other torts.” *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657,
 21 666 (9th Cir. 2017) (quotation omitted).

22 The late Supreme Court Justice Antonin Scalia described that a system that
 23 responds automatically to user input may still satisfy the volitional conduct
 24 requirement if it is involved in the selection, coordination, or arrangement of the
 25 content that the user interacts with:

26 Most of the time that issue will come down to who selects the copyrighted
 27 content: the defendant or its customers. [citation]

28 A comparison between copy shops and video-on-demand services illustrates
 the point. A copy shop rents out photocopiers on a per-use basis. One

customer might copy his 10-year-old's drawings—a perfectly lawful thing to do—while another might duplicate a famous artist's copyrighted photographs—a use clearly prohibited by §106(1). Either way, the customer chooses the content and activates the copying function; the photocopier does nothing except in response to the customer's commands. Because the shop plays no role in selecting the content, it cannot be held directly liable when a customer makes an infringing copy. [citation]

Video-on-demand services, like photocopiers, respond automatically to user input, but they differ in one crucial respect: They choose the content. When a user signs in to Netflix, for example, “thousands of . . . movies [and] TV episodes” carefully curated by Netflix are “available to watch instantly.” [citation]. That selection and arrangement by the service provider constitutes a volitional act directed to specific copyrighted works and thus serves as a basis for direct liability.

The distinction between direct and secondary liability would collapse if there were not a clear rule for determining whether the defendant committed the infringing act. [citation]. The volitional-conduct requirement supplies that rule; its purpose is not to excuse defendants from accountability, but to channel the claims against them into the correct analytical track. [citation]. Thus, in the example given above, the fact that the copy shop does not choose the content simply means that its culpability will be assessed using secondary-liability rules rather than direct-liability rules. [citations].

See ABC, Inc. v. Aereo, Inc., 573 U.S. 431, 454-56 (2014) (Scalia, J. dissenting).

Like the Netflix example provided by Justice Scalia, 4Internet plays a critical role in selecting, coordinating, and arranging the content that is presented to user who perform a search query on one of its websites. The 4Search network operated by 4Internet is premised on the utilization of “affinity types” which allows users to receive a set of targeted search results based on topics of interest. SSUF Nos. 13-14. This targeted search functionality begins with “seed points” which are domains preselected by 4Internet based on their relevance to a specific affinity type and that act as a starting point for a particular search conducted on one of the websites in the 4Search network. SSUF No. 15. Web crawlers start at these seed points and compile information deemed relevant into an “index” controlled by 4Internet where it remains until queried by a user. SSUF Nos. 16-17.

After a query is entered into one of the domains in the 4Search network, a web page is generated based on specifications provided by 4Internet which tells the index which information to use to populate the page and how to compile that information to display through a user's browser. For example, 4Internet can set a limit to the

1 amount of text that populates from the index or can cause indexed photographs to be
2 displayed or completely blocked on the page that is generated. SSUF No. 18.

3 Here 4Internet engaged in volitional conduct by purposefully curating the
4 “seed points” for 4Jewish and 4Rightwing and by further determining what
5 information from the 4Internet index is presented to users who make a query. In that
6 sense, 4Internet acts as a “gatekeeper,” determining precisely the type of content that
7 its users can be exposed to and how that content is ultimately presented.

8 With respect to Miller’s Goat Photograph, once the content from Post’s RSS
9 feed was placed in the 4Internet index and queried by a user, 4Internet determined
10 that the Goat Photograph should be prominently displayed via an inline link above
11 text from the Post Article and presented to the user in response to their query. *See*
12 SSUF Nos. 32-34. Indeed, at that time, 4Internet was actively tinkering with
13 appearance and functionality of its webpages in order to try figure out what users
14 would respond to which resulted in numerous changes that occurred day to day, hour
15 by hour, or sometime even click by click. SSUF No. 38.

16 Thus, 4Internet can be said to have engaged in volitional conduct when it
17 instructed the Goat Photograph to be publicly displayed on 4Jewish and 4RightWing
18 in response to a user query. These unauthorized acts violated Miller’s exclusive right
19 to publicly display the Goat Photograph. *See* 17. U.S.C. § 106(5).

20 Thus, 4Internet has directly infringed the Goat Photograph by violating
21 Miller’s exclusive right to display, and summary judgment should be granted.

22 **a. 4Internet’s use of an inline link violates Miller’s**
23 **exclusive right to display the Goat Photograph.**

24 As described above, 4Internet did not make a direct copy of the Goat
25 Photograph on to its server, but instead displayed the Goat Photograph via an inline
26 link directly from the Post’s website. SSUF No. 32.

27 Miller anticipates that 4Internet will argue that its use of inline linking will
28 absolve 4Internet from infringement since a copy of the Goat Photograph itself does

not actually reside on a 4Internet controlled server. However, recent case law has affirmatively held that the use of embedded content hosted on third party servers still runs afoul of a copyright holder’s exclusive display rights through the use of inline links.¹ The court in *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 587 (S.D.N.Y. 2018) provided the following explanation of the practice, which it referred to as “embedding”:

A webpage is made up of a series of instructions usually written by coders in Hypertext Markup Language (“HTML”). These instructions are saved to a server (a computer connected to the internet), and when a user wishes to view a webpage, his or her computer’s browser connects with the server, at which point the HTML code previously written by the coder instructs the browser on how to arrange the webpage on the user’s computer. The HTML code can allow for the arrangement of text and/or images on a page and can also include photographs. When including a photograph on a web page, the HTML code instructs the browser how and where to place the photograph. Importantly for this case, the HTML code could instruct the browser either to retrieve the photograph from the webpage’s own server or to retrieve it from a third-party server.

“Embedding” an image on a webpage is the act of a coder intentionally adding a specific “embed” code to the HTML instructions that incorporates an image, hosted on a third-party server, onto a webpage. To embed an image, the coder or web designer would add an “embed code” to the HTML instructions; this code directs the browser to the third-party server to retrieve the image. An embedded image will then hyperlink (that is, create a link from one place in a hypertext document to another in a different document) to the third-party website. The result: a seamlessly integrated webpage, a mix of text and images, although the underlying images may be hosted in varying locations. Most social media sites—Facebook, Twitter, and YouTube, for example—provide code that coders and web designers can easily copy in order to enable embedding on their own webpages.

Goldman v. Breitbart News Network, LLC, 302 F. Supp. 3d 585, 587 (S.D.N.Y. 2018).

Nowhere does the Copyright Act suggest that physical possession of an image is necessary in order to display it or violate the display right. *Id.* at 593. Indeed, the purpose and language of the Act support the opposite view. *Ibid.* The definitions in § 101 are illuminating. First, to display a work publicly means to “to transmit . . . a . . . display of the work . . . by means of *any device or process.*” 17 U.S.C. §

¹ The terms “inline linking”, “embedding” and “framing” are used somewhat interchangeable in the case law to describe this practice although the true definitions denote slightly differing technical processes. See <https://www.nolo.com/legal-encyclopedia/linking-framing-inlining-30090.html> (last visited Nov. 1, 2021). For the purposes of this Motion, Miller will refer to the practice as “inline linking” which, in counsel’s opinion, appears to be the most accurate description of the technical process at issue in this case.

1 101(emphasis added). To transmit a display is to “communicate it by *any device or*
 2 *process* whereby images or sounds are received beyond the place from which they
 3 are sent.” *Ibid.* (emphasis added). Devices and processes are further defined to mean
 4 ones “now known or later developed.” *Ibid.* This is plainly drafted with the intent to
 5 sweep broadly. *Goldman*, 302 F. Supp. 3d at 593.

6 Likewise, other courts to have considered the issue have found the practice of
 7 “inline linking” of photographs to constitute actionable copyright infringement. *See*
 8 *Goldman*, 302 F. Supp. 3d at 590-93 (discussing cases and concluding that on the facts
 9 at bar, “when defendants caused the embedded Tweets to appear on their websites,
 10 their actions violated plaintiff’s exclusive display right.”); *The Leader’s Inst., LLC v.*
 11 *Jackson*, 2017 U.S. Dist. LEXIS 193555, 2017 WL 5629514 (N.D. Tex. Nov. 22,
 12 2017) (by “framing the defendant’s copyrighted works, the plaintiffs impermissibly
 13 displayed the works to the public.”); *see also Free Speech Sys., LLC v. Menzel*, 390 F.
 14 Supp. 3d 1162, 1172 (N.D. Cal. 2019).

15 Regardless of the technological processes at play, it is abundantly clear that
 16 4Internet is liable for causing the Goat Photograph to be publicly displayed on 4Jewish
 17 and 4RightWing in violation of Miller’s exclusive right to publicly display.

18 **3. 4Internet Is Also Vicariously Liable For Infringement.**

19 Vicarious liability “allows imposition of liability when the defendant profits
 20 directly from the infringement and has a right and ability to supervise the direct
 21 infringer, even if the defendant initially lacks knowledge of the infringement.”
 22 *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, n.9 (2005); *see*
 23 *also Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (“A defendant is
 24 vicariously liable for copyright infringement if he enjoys a direct financial benefit
 25 from *another’s* infringing activity and ‘has the right and ability to supervise’ the
 26 infringing activity”) (emphasis in original) *see also Fonovisa, Inc. v. Cherry*
 27 *Auction, Inc.*, 76 F.3d 259, 261-64 (9th Cir. 1996).

28 As to the first prong of establishing vicarious liability, it is undisputed that

1 4Internet has the ability to supervise and control the content on 4Jewish and
2 4RightWing by determining precisely the type of content that its users can be
3 exposed to when querying the 4Interne index and how that content is ultimately
4 presented. *See* SSUF Nos. 15-18. Therefore, the first prong is established.

5 The second prong considers whether a defendant has a financial interest in the
6 infringing activity. Financial benefit exists where the availability of infringing
7 material “acts as a ‘draw’ for customers.” *Fonovisa*, 76 F.3d at 263-64 (stating that
8 financial benefit may be shown “where infringing performances enhance the
9 attractiveness of a venue”).

10 Here the second prong of vicarious liability is satisfied. 4Internet is in the
11 business of, among other things, domain sales. SSUF No. 11. 4Internet was also
12 interested in actively developing the appearance and functionality of its webpages in
13 order to try figure out what users would respond too, which included incorporating
14 photographs such as the Goat Photograph. *See* SSUF Nos. 38-40. In other word,
15 4Internet clearly understood that incorporating photographs such as the Goat
16 Photograph into the functionality and design of its websites would lead to a better
17 user experience thus acting as a draw to users and increasing the value of the
18 domains.

19 Thus, Miller has established that 4Internet is vicariously liable.

20 **B. Miller Can Seek Statutory Damages And Attorneys’ Fees.**

21 Miller is also entitled to summary judgment that he is eligible to pursue
22 statutory damages and attorneys’ fees. 17 U.S.C. § 412(2) provides that “no award
23 of statutory damages or of attorney’s fees, as provided by sections 504 and 505, shall
24 be made for any infringement of copyright commenced after first publication of the
25 work and before the effective date of its registration, unless such registration is made
26 within three months after the first publication of the work.”

27 Here the Goat Photograph was first published on August 9, 2018. SSUF No.
28 25. Miller subsequently registered the Goat Photograph on September 25, 2018.

1 SSUF No. 26. Because the Goat Photograph was registered within three months of
 2 first publication, Miller is entitled to seek statutory damages and attorneys' fees/

3 Thus, summary judgment may properly be entered.

4 **IV. 4INTERNET'S AFFIRMATIVE DEFENSES MUST FAIL**

5 **A. Miller Has Sufficiently Stated A Claim**

6 4Internet's First Affirmative Defense is "Failure to State A Claim." As stated
 7 in section III.A, *supra*, Miller has validly stated a claim for infringement.

8 **B. Miller's Goat Photograph Is Sufficiently Creative**

9 4Internet's Second Affirmative Defense is that Miller's Goat Photograph
 10 lacks the constitutionally required minimal degree of creativity. As stated in section
 11 III.A.1, *supra*, the Goat Photograph is sufficiently original to be copyrightable.

12 **C. 4Internet's Conduct Was Not A Fair Use**

13 The Copyright Act lists four factors non-exclusive factors that a court must
 14 weigh when determining whether a use is fair: (1) the purpose and character of the
 15 use, including whether such use is of a commercial nature or is for nonprofit
 16 educational purposes; (2) the nature of the copyrighted work; (3) the amount and
 17 substantiality of the portion used in relation to the copyrighted work as a whole; and
 18 (4) the effect of the use upon the potential market for or value of the copyrighted
 19 work. 17 U.S.C. § 107.

20 As the Ninth Circuit opined "the label 'search engine' is not a talismanic term
 21 that serves as an on-off switch as to fair use," rather a court must be cognizant of
 22 "the importance of considering the details and function of a website's operation in
 23 making a fair use determination." *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 742
 24 (9th Cir. 2019).

25 In this case, all four factors weigh heavily against a finding of fair use.

26 **1. The Purpose And Character Of The Use Weighs Against A**
Finding Of Fair Use.

27 The first factor directs courts to look specifically at the use made of the
 28 copyrighted work to determine whether it qualifies for fair use. *See* 17 U.S.C. § 107.

1 In interpreting the “purpose and character” of the use, courts look at whether the
 2 work was transformative, and whether the use was for commercial purposes. *See*
 3 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579, (1994).

4 Commercial use is an important consideration in the first fair use factor, and a
 5 profit motivation may weigh heavily against fair use. *See Harper & Row Publishers,*
 6 *Inc v. Nation Enterprises*, 471 U.S. 539, 562 (1985) (explaining that even straight
 7 reporting may, in some cases, be “commercial” for purposes of this factor). The crux
 8 of the profit/nonprofit distinction is not whether the sole motive of the use is
 9 monetary gain, but whether the user stands to profit from exploitation of the
 10 copyrighted material without paying the customary price. *Ibid.*

11 In this case, 4Internet is clearly a for-profit company that intends to generate
 12 revenue. *See* SSUF No. 11. Additionally, 4Internet’s use of the Goat Photograph
 13 cannot be considered “transformative” because 4Internet concededly does not claim
 14 to have altered the Goat Photograph in any way. SSUF No. 32. Nor does 4Internet’s
 15 utilize the Goat Photograph in a “new context.” Indeed, the Goat Photograph is
 16 simply reproduced over verbatim copied text from the original Post Article. *See*
 17 SSUF Nos. 29, 32, and 34; see also *Otto v. Hearst Comms., Inc.*, 345 F. Supp. 3d
 18 412, 428 (S.D.N.Y. 2018) (“Stealing a copyrighted photograph to illustrate a news
 19 article, without adding new understanding or meaning to the work, does not
 20 transform its purpose—regardless of whether that photograph was created for
 21 commercial or personal use.”).

22 Finally, 4Internet’s use of the Goat Photograph does not meaningfully affect
 23 the functionality of its search technology. Indeed, the use of the Goat Photograph
 24 seems wholly gratuitous which renders its usage less likely to be fair.

25 Thus, the first factor weight against fair use.

26 ***2. The Nature Of The Copyrighted Work Weighs Against A*** 27 ***Finding Of Fair Use.***

28 The second factor considers “the nature of the copyrighted work.” In so doing,

the court may consider, among other things, whether the work was creative, imaginative, and original, . . . and whether it represented a substantial investment of time and labor made in anticipation of financial return. *Pro Arts, Inc. v. Hustler Magazine, Inc.* 787 F.2d 592 (6th Cir. 1986) (quotation omitted). Photographs are generally viewed as creative, aesthetic expressions of a scene or image and have long been the subject of copyright. *See* 17 U.S.C. § 102(a)(5) (extending copyright protection to “pictorial, graphic, and sculptural works”). The Goat Photograph is clearly subject to protectable copyright. *Ibid.*

Thus, the nature of the Images weighs against a finding of fair use.

3. The Amount And Substantiality Of The Portions Used Weighs Against A Finding Of Fair Use.

The third fair use factor directs courts to examine the amount and substantiality of the portion used in relation to the copyrighted work as a whole. *See Sheldon v. Metro-Goldwyn Pictures Corp.*, 471 U.S. 539, 565 (1985) (“no plagiarist can excuse the wrong by showing how much of his work he did not pirate”).

In the case at hand, 4Internet did not just use a portion of the Goat Photograph, rather it used the entire work. In fact, 4Internet expressly stated that it needed to use a full-size version of the Goat Photograph rather than a thumbnail because thumbnail images were too small and too low quality for 4Internet’s purposes. SSUF No. 33.

Since the 4Internet used the entirety of the Goat Photograph the third factor weighs against the application of fair use.

4. The Effect On The Market Place Weighs Against Fair Use.

Notably the four factor looks to the effect of the use upon the *potential* market for or value of the copyrighted work. *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1181 (9th Cir. 2012) (Recognizing that fair use focuses on potential, not just actual, market harm).

Here, Miller business depends on his ability to convince publications to pay a

1 licensing fee to use his photographs. SSUF No. 9. Miller's arrangement with the
 2 Post allows him opportunities to license his photographs to third parties. SSUF No.
 3 7. However, unauthorized use of Miller's photographs has led to a rapid decline in
 4 the number of paid licenses and impacts the overall value of his photographs by
 5 diminishing exclusivity and causing Miller to have to devote significant amounts of
 6 time and money to detecting and pursuing infringements. SSUF No. 10.

7 4Internet seems to think that it is exempt from licensing content because it
 8 allegedly operates a "search engine." However, nobility of the user's purpose does
 9 not widen the scope of fair use. *Sadowski v. BackChina* 2018 U.S. Dist. LEXIS
 10 120875 at *4 (S.D. Tex. July 16, 2018). Indeed, the fact that 4Internet's use of the
 11 Goat photograph was wholly gratuitous only exacerbates the problem further by
 12 significantly increasing the potential for downstream infringement. As such, the
 13 fourth factor weights against a finding of fair use.

14 In conclusion, the statutory factors weight heavily against a finding of fair use.

15 **D. 4Internet Cannot Prove Unclean Hands**

16 4Internet's Fourth Affirmative Defense is that Miller's alleged "practice of
 17 taking photographs of no actual value, for which there is no market, and seeding
 18 them on for the purpose of generating revenue through copyright infringement,
 19 Plaintiff's claims for equitable relief are barred by unclean hands."

20 "To establish unclean hands, a defendant must demonstrate (1) inequitable
 21 conduct by the plaintiff; (2) that the plaintiff's conduct directly relates to the claim
 22 which it has asserted against the defendant; and (3) plaintiff's conduct injured the
 23 defendant." *Survivor Prods. LLC v. Fox Broad Co.*, 2001 WL 35829270, at *3
 24 (C.D. Cal. June 12, 2001).

25 4Internet has offered no evidence of fraud or abuse of process to support the
 26 affirmative defense for unclean hands. Furthermore, to the extent 4Internet intends
 27 to rely on *other* lawsuits filed by Miller, that cannot act as a basis for unclean hands
 28 since the inequitable conduct must directly relate to the claim asserted. 4Internet

1 has not show that Miller has engaged in any inequitable conduct with respect to the
 2 underlying matters in this case. In any event, “the filing of a lawsuit cannot itself
 3 form the basis of an unclean hands defense.” *Gen-Prob, Inc. v. Amoco Corp.*, 926
 4 F. Supp. 948, 952 (S.D. Cal. 1997).

5 Thus, summary judgment is appropriate.

6 **E. 4Internet Does Not Have An Implied License**

7 For its Sixth² Affirmative Defense 4Internet alleges that “[b]y placing
 8 photographs of no real value, for which there is no market, on the [I]nternet, without
 9 providing any copyright notice in the photograph’s metadata, Plaintiff has granted an
 10 implied revocable license for the use of such photographs.”

11 This defense fails for numerous reasons. First, the Berne Convention
 12 Implementation Act of 1988, Pub.L. No. 100–568, 102 Stat. 2853 (1988), eliminated
 13 any notice requirement completely. Thus, while the current statute states that “a
 14 notice of copyright ... *may* be placed on publicly distributed copies,” 17 U.S.C. §
 15 401(a) (emphasis added), affixing notice is no longer mandatory for works first
 16 published after March 1, 1989. *See Innovative Networks, Inc. v. Satellite Airlines*
 17 *Ticketing Centers, Inc.* 871 F.Supp. 709, 720 (S.D.N.Y. 1995).

18 Second, the mere fact that a copyrighted work is published on the Internet is
 19 not in and of itself sufficient to show that the author has provided an unrestricted
 20 implied license. *See e.g. Veeck v. S. Bldg. Code Cong. Int’l Inc.*, 241 F.3d 398, 409
 21 (5th Cir. 2001) (Observing that “countless entities provide free access to materials
 22 on the Internet and still retain enforcement of their copyrights.”[quotation
 23 omitted]); *see also Thornton v. J Jargon Co.*, 580 F. Supp. 2d 1261, 1281-82 (M.D.
 24 Fla. 2008) (“Defendants provide no authority for the proposition that the posting of
 25 the BBQE on Plaintiff’s website granted an implied license to all [I]nternet users or
 26 that the work thereby entered the ‘public domain.’”). Indeed, in order to exploit
 27

28 ² 4Internet’s Fifth Affirmative Defense was stricken by consent.

1 many of the exclusive rights of copyright, the copyright holder is required to
 2 disseminate the work publically in some manner. *See* 17 U.S.C. § 106(3)(exclusive
 3 right to distribute); (4)(exclusive right to publically perform); (5)(exclusive right to
 4 publically display).

5 Finally, the Ninth Circuit has held that an implied license has been granted
 6 when the following three elements are satisfied: “(1) a person (the licensee) requests
 7 the creation of a work, (2) the creator (the licensor) makes that particular work and
 8 delivers it to the licensee who requested it, and (3) the licensor intends that the
 9 licensee-requestor copy and distribute his work.” *Asset Marketing Systems, Inc v.*
 10 *Gagnon*, 542 F.3d 748, 756 (9th Cir. 2008). Here, it is not disputed that the Post, and
 11 not 4Internet, requested the creation of the Goat Photograph. SSUF Nos. 19-25.

12 Thus, 4Internet cannot meet the requirements of an implied license and
 13 summary judgment should be entered in favor of Miller.

14 **F. 4Internet Does Not Have A License From Twitter**

15 4Internet’s Seventh Affirmative Defense states that “The New York Post
 16 placed the subject image on Twitter®. In so doing, the terms and conditions found at
 17 <https://twitter.com/en/tos> provide that the license granted to Twitter ‘authorizes us to
 18 make your Content available to the rest of the world *and to let others do the same*
 19 (emphasis added). [sic] Plaintiff’s claims are therefore barred by express license.”

20 This affirmative defense fails for numerous reasons. First, it is undisputed that
 21 4Internet pulled the Goat Photograph from the Post’s RSS feed and not from
 22 Twitter. SSUF Nos. 29-30. 4Internet fails to explain how or why the Twitter terms
 23 of service would govern for photographs not obtained from the Twitter platform.
 24 Indeed, the Post’s terms of service which *do* govern the use of its services, including
 25 its RSS feed, and explicitly prohibits the third party use of its content without prior,
 26 written consent, which 4Internet concededly failed to obtain. SSUF Nos. 31, 35.

27 Second, to the extent that the Twitter terms of service would govern, the
 28 quoted section by 4Internet merely states that Twitter and others are authorized to

1 “make your Content available.” This phrase is, at best, ambiguous, and does not
 2 explicitly state that an unlimited license is being created. Indeed, just because
 3 Twitter or its users might be authorized to make certain content “available” through
 4 the Twitter platform does not imply that anyone has a license to use the content in
 5 any manner whatsoever.

6 Finally, Court’s to have considered similar arguments have found that the
 7 Twitter terms of service do not confer a broad license. *See Agence Fr. Presse v.*
 8 *Morel* , 769 F. Supp. 2d 295, 302 (S.D.N.Y. 2011) (interpreting Twitter terms of
 9 service); *Agence Fr. Presse v. Morel* , 934 F. Supp. 2d 547, 559 (S.D.N.Y. 2013).

10 Thus, summary judgment should be entered in favor of Miller.

11 **G. Miller’s Goat Photograph Is Sufficiently Original**

12 4Internet’s Eight Affirmative Defense is that Miller’s Goat Photograph
 13 “sufficient originality such that it does not qualify for registration under 17 U.S.C. §
 14 102.” As stated in section III.A.1, *supra*, the Goat Photograph is sufficiently original
 15 to be copyrightable. Additionally, the Goat Photograph was accepted as
 16 copyrightable by the Register of Copyrights, which issued Miller registration
 17 number VA 2-120-723. SSUF Nos. 26-27.

18 **H. 4Internet’s DMCA Defense Is Factually Inaccurate.**

19 4Internet’s Ninth Affirmative Defense contends that 4Internet is protected by
 20 the safe harbor provision of 17 U.S.C. § 512(a) and (b).

21 The Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512,
 22 established four safe harbors to provide protection from liability for copyright
 23 infringement. *Mavrix Photographs, Ltd. Liab. Co. v. LiveJournal, Inc.*, 853 F.3d
 24 1020, 1027 (9th Cir. 2017). Section 512(a) provides safe harbor for service providers
 25 who act as conduits for infringing content. *Perfect 10, Inc. v. CCBill LLC*, 481 F.3d
 26 751, 764-65 (9th Cir. 2007). As described the by the *CCBill* court:

27 When an individual clicks on an Internet link, his computer sends a request for
 28 the information. The company receiving that request sends that request on to
 another computer, which sends it on to another. After a series of such

1 transmissions, the request arrives at the computer that stores the information.
 2 The requested information is then returned in milliseconds, not necessarily
 3 along the same path. In passing the information along, each intervening
 4 computer makes a short-lived copy of the data. A short time later, the
 5 information is displayed on the user's computer.

6 Those intervening computers provide transient connections among users. The
 7 Internet as we know it simply cannot exist if those intervening computers
 8 must block indirectly infringing content. We read § 512(a)'s grant of immunity
 9 exactly as it is written: Service providers are immune for transmitting all
 10 digital online communications, not just those that directly infringe.

11 *Perfect 10, Inc. v. CCBill LLC*, 481 F.3d 751, 765 (9th Cir. 2007)

12 Here, it is not disputed that 4Internet did not actually make a copy of the Goat
 13 Photograph, but merely caused it to be displayed via an inline link from the Post's
 14 server. SSUF No. 32. Thus, 17 U.S.C. § 512(a) which protects service providers
 15 from making potentially infringing "short-lived cop[ies] of the data" cannot apply to
 16 4Internet who is not accused of transmitting any infringing data at all.

17 Furthermore, the basis of Miller's infringement claim has nothing to do with
 18 transmission of content as described by the *CCBill* court. Rather, it has to do with
 19 the display of the Goat Photograph on 4Jewish and 4RightWing. Thus, to the extent
 20 any protected "transmitting" is at issue, it does not form the factual basis for Miller's
 21 infringement claim. *See CCBill LLC*, 481 F.3d at 766 ("Even if the hyperlink
 22 provided by CCBill could be viewed as an 'information location tool,' the majority of
 23 CCBill's functions would remain outside of the safe harbor of § 512(d) . . . Perfect 10
 24 does not claim that CCBill infringed its copyrights by providing a hyperlink; rather,
 25 Perfect 10 alleges infringement through CCBill's performance of other business
 26 services for these websites.").

27 Similarly, the section 512(b) safe harbor limits liability of service providers
 28 who make "intermediate and temporary storage" of copyrighted material stored in a
 cache. 17 U.S.C. § 512(b). Again, it is not disputed that 4Internet did not actually
 make a copy of the Goat Photograph, but merely caused it to be displayed via an
 inline link from the Post's server. SSUF No. 32. Thus, 512(b) applies to caching
 cannot apply to 4Internet who is not accused of placing a copy of the Goat

1 Photograph into a cache.

2 Furthermore, the basis of Miller’s infringement claim has nothing to do with
3 storage of any content in a cache. Rather, it has to do with the display of the Goat
4 Photograph on 4Jewish and 4RightWing.

5 Thus, summary judgment should be entered in favor of Miller.

6 **I. 4Internet’s Constitutional Challenge Is Nonsensical**

7 4Internet’s final affirmative defense challenges the constitutionality of 17
8 U.S.C. §§ 102 and 410 as applied to photographs.

9 As 4Internet acknowledges, American copyright law has its origins directly in
10 the text of the Constitution itself which specifically enumerates to Congress the
11 broad apower “[t]o promote the Progress of Science and useful Arts, by securing for
12 limited Times to Authors and Inventors the exclusive Right to their respective
13 Writings and Discoveries.” U.S. Const. art. I, § 8, cl. 8; *see also* 1 Patry on
14 Copyright § 1:18 (setting forth the history of the copyright clause and its origins at
15 the Constitutional Convention in 1787). Since its adoption, Congress has repeatedly
16 chosen to exercise its Constitutional authority through copyright related legislation,
17 the most recent of which is the Copyright Act of 1976. *See* 17 U.S.C. §§ 101 et seq.

18 In essence, 4Internet is asking this Court to declare that Congressional
19 Because Congressional power to legislate on matters of copyright is rooted in the
20 text of the Constitution itself, 4Internets argument would have this Court declare
21 Article I, section 8, clause 8 to itself be unconstitutional. Since it would defy
22 common sense to declare the Constitution itself unconstitutional. 4Internet’s
23 argument must fail.

24 Finally, previous constitutional challenges to copyright have been
25 unsuccessful. *See Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S.
26 539, 568 (1985) (rejecting First Amendment challenge to copyright infringement
27 action); *see also Zacchini v. Scripps-Howard*, 433 U.S. 562, 574-78 (1977).

28 Thus, summary judgment should be entered in favor of Miller.

1 **V. CONCLUSION**

2 In conclusion, Plaintiff Robert Miller respectfully requests that summary
3 judgment be entered in his favor and against Defendant 4Internet, LLC.

4 DATED: November 1, 2021

Respectfully submitted,

6 /s/ Ryan E. Carreon
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PROOF OF SERVICE

I, the undersigned, say:

I am a citizen of the United States, am over the age of 18 and not a party to the within action. My business address is 2445 Fire Mesa St., Suite 150, Las Vegas, NV 89128.

On November 1, 2021 I caused to be served the foregoing documents:

**NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT;
DECLARATION OF RYAN E. CARRREON; DECLARATION OF
ROBERT MILLER; DECLARATION OF EUGENE SADOWSKI;
SEPARATE STATEMENT OF UNDISPUTED FACTS; INDEX OF
EXHIBITS AND EVIDENCE**

X I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court, District of Nevada using the CM/ECF system which will send notice of such filing to the following registered CM/ECF users:

Ryan Isenberg ryan@ihlaw.us

I certify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on November 1, 2021 at Wilmington, Delaware.

/s/ Ryan E. Carreon
Ryan E. Carreon